Supreme Court, U.S.
FILED

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No. 02-

IN THE

# Supreme Court of the United States

RICHARD ARIA, *et al.*,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether congressional enactment of the Swamp and Overflowed Lands Act of September 28, 1850 established an *in praesenti* grant to the individually affected states such that title vested in the states as of that date?

2. Whether title to swamp lands is retained by the federal government until such time as the federal government elects to issue a patent to the state?

3. Whether the Ninth Circuit Court of Appeals correctly held that this Court's line of precedent establishing and reconfirming the doctrine of "relation back" as to swamp lands has been implicitly overruled by a "trend" in the case law requiring that a patent be issued before a state's title to swamp lands becomes perfected?

## LIST OF PARTIES

The Petitioners not listed in the caption are: Thomas E. and Barbara J. Fryer, Daniel and Joyce McIntyre, James L. and Terry S. Henderson, Alora and Alvin Grudem, Donald and Margaret M. Lewis, Gail Frances Jewell, Rose Marie Burdick, Kenneth Lucas, Helmut and Kathryn Teffke, Terry Anderson (successor in interest to Sharon O'Connor), Richard and Ruth Aria, Lewis M. Cooper, Shirley J. and Brewer Johnson, Leroy Munsun, George and Charlotte Harrison, Crystal L. Giannotti and Lucinda Giannotti.

The Respondents are United States of America and Fort Mohave Indian Tribe. In addition, Robert Hall and Camille Englemann are also being served as Respondents.

## STATEMENT PURSUANT TO RULE 29.6

Petitioner Fidelity National Title Insurance Company ("Fidelity) states its corporate parent is Fidelity National Financial, Inc.; and there are no other publicly held companies that own 10% or more of Fidelity's stock.

Petitioner Mohave Valley River Enterprises, Inc. ("MVRE") states that it has no parent companies and there are no publicly held companies which own 10-percent or more of MVRE's stock.

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The Order and Amended Opinion (the "Amended Opinion") on which review is sought was entered on May 29, 2002. Prior to that, on January 28, 2002, the same panel of judges for the Ninth Circuit Court of Appeals issued its Initial Opinion ("Initial Opinion") in this matter. Both the Initial Opinion and the Amended Opinion were published and are set forth herein as Appendix A and B, respectively. The district court issued its unpublished findings of fact and conclusions of law and order on March 30, 2000. (Appendix C).

## STATEMENT OF JURISDICTION

On August 20, 2002, this Court granted Petitioners an extension of time through October 11, 2002, within which to file this Petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## APPLICABLE STATUTORY PROVISIONS

Swamp and Overflow Lands Act of 1850: 9 Stat. 519 (Appendix D).

## STATEMENT OF THE CASE

The case involves a dispute regarding ownership of approximately 130 acres of land (the "Disputed Land") located adjacent to, and on the east side of, the current alignment of the Colorado River. Amended Opinion, at 7a. More specifically, the Disputed Land is located approximately 20 miles south of Bullhead City, Arizona, within what is often referred to as the Mohave Valley.

Historically, title to the Disputed Land has been held by private persons, many of whom are parties to this lawsuit.

Indeed, the Disputed Land had been bought, sold, improved and enjoyed in a manner comparable to any other privately held real property. For more than 100 years prior to date on which the United States filed this lawsuit, the Disputed Land has been in private ownership and neither the United States nor the Fort Mohave Indian Tribe ever intimated that they might have an ownership interest in it.

Then, in 1994, for some yet unexplained reason, the United States sought to divest the private landowners of their title. The United States filed this lawsuit and sought to quiet title the Disputed Land in favor of itself as trustee for the Fort Mohave Indian Tribe ("the Tribe"). In addition, the United States sought an order of ejectment against the private individuals and entities that held record title to the Disputed Land.

All of the United States' claims were based on its assertion that the Disputed Land was formed by the gradual process of "accretion" and thus was owned by the Tribe, the entity that owned the riparian section of land located adjacent to and east of the Disputed Land.[1] Pursuant to the legal principles associated with the process of accretion, the United States contended that all record titles were invalid and that it (on behalf of the Tribe) should become the "rightful" owner of the Disputed Land.

In response to the legal assault by their own government, the landowners/Petitioners sought to defend their titles to

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1. "'Accretion' is the gradual, imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain." Amended Opinion at 4a.

the Disputed Lands. The district court conducted a 5-day trial on the government's claims. Based upon the evidence presented at trial, the district court found that the government failed to carry its burden of proof that the Disputed Land was formed by accretion to the Tribe's upland section. In fact, the district court found that the landowners/Petitioners demonstrated that there had been an *avulsive* movement[2] of the Colorado River in 1857, which, as a matter of law, *fixed* the state boundary line in a location east of the Disputed Land. Therefore, notwithstanding any subsequent river movements or statutory enactment, title to the Disputed Land remained within the jurisdiction of the State of California. Thus, although the district court did not enter an order quieting title in them, because all of the private landowners/ Petitioners derived their titles from a California patent, the effect of its judgment is that they defeated the government/ Tribe's ownership claims.

The United States filed a timely appeal from the district court's decision. For purposes of this Petition, the United States' principal argument on appeal[3] was that the district court erred in considering the effect of Colorado River movements which occurred before the date patents with respect to the Disputed Land were issued by the federal government. After briefing and oral argument, on January 28,

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2. An "avulsive movement" of a river "occurs when a river abandons its old course and adopts a new one 'suddenly or in such a manner as to destroy the identity of the land between the old and new channels.'" Amended Opinion at 5a, *citing State v. Jacobs*, 380 P.2d 998, 1001 (Ariz. 1963).

3. In addition to the issue addressed in this Petition, the United States raised another issue relative to jurisdiction. That issue has been resolved and is not an element of this Petition.

2002, the assigned Ninth Circuit panel issued its Initial Opinion, reversing and remanding the judgment entered by the district court. The basis for that holding was the Ninth Circuit's conclusion that the "relation-back" principle adopted by this Court in cases dating back to 1876 had been implicitly overruled by more recent Supreme Court precedents. Initial Opinion, at 20a-21a. Petitioners filed a Petition for Rehearing, bringing to the Ninth Circuit Court's attention serious flaws in its reasoning. Without further briefing or argument, the same Ninth Circuit panel, on May 29, 2002, issued its Amended Opinion. Although the Amended Opinion reflects a revised "discussion" of the principal issue, it did *not* alter the Court's conclusion.

If the Amended Opinion is allowed to stand, the Petitioners face another expensive multi-day trial in district court. In light of the fact that they have already conclusively established their ownership rights in a manner consistent with *this* Court's applicable precedent, such a result is manifestly unfair. Consequently, the landowners/Petitioners hereby seek review by this Court.

## INTRODUCTION

In order to understand the framework for the Ninth Circuit's legal analysis, it is helpful to note the context in which it is presented. While the issue is easily stated, the factual and legal underpinnings illuminate the discussion.

In September of 1850, California became a state. As a result, a boundary line was created along the centerline of the Colorado River, dividing the new State of California from the then-existing New Mexico-Arizona territory to the east. Simultaneously, pursuant to the so-called Equal Footing

Doctrine, California became the owner of all the land underlying the west half of the "navigable" Colorado River. *United States v. Utah*, 283 U.S. 64 (1931).

Later in the same month of September 1850, the United States Congress passed the Swamp and Overflowed Lands Act (the "Swamp Act"), 9 Stat. 519 (1850), codified at 43 U.S.C. § 982. By its terms, the Swamp Act granted to the State of California title to *all* swamp and overflowed lands within the State. As of that date, the Disputed Land was located within California and was later (pursuant to federal government survey) designated as swamp and overflowed lands. Thus, by act of Congress (i.e., the Swamp Act) as of September 28, 1850, title to the Disputed Land was conveyed to the State of California. Although the record does not contain specific dates, the evidence is undisputed that the State of California later conveyed title to the Disputed Land to various private persons and/or entities.

Given the foregoing, the government had to concede that the chain of title to the Disputed Land derived from California's ownership, as a matter of law. Because the landowners/Petitioners obtained their titles pursuant to that chain, they should be the rightful owners of the Disputed Land, absent some intervening event that would invalidate their titles.

In filing the instant lawsuit, the United States claimed it had identified such an intervening event. Specifically, the United States claimed that the Disputed Land had been eroded away and thereafter reformed by the process of accretion on the Arizona side of the Colorado River. Accordingly, the United States contended, pursuant to the law applicable to the processes of accretion and avulsion, that title to this

reformed land was now vested in the owner of the adjacent Arizona riparian section – the Tribe.

This matter was tried in the district court in September 1997. After a 5-day trial and extensive briefing, the district court issued its Findings of Fact and Conclusions of Law on March 31, 2000. Based upon the evidence submitted at trial, the district court found that an 1857 avulsive event occurred in the Colorado River in the reach within which the Disputed Land is located. The district court properly recognized, as a matter of law, that avulsion would "forever fix" land titles to properties in the area according to the pre-avulsion boundaries. Because those landowners derived their titles to the Disputed Land from the State of California, title should remain with that State (and, later, its successors, the Landowners/Petitioners). That is precisely what the district court held. Amended Opinion at 5a.

On appeal, the United States contended that, because patents to the subject Disputed Land were not issued by the federal government until 1905, any and all pre-1905 movements of the Colorado River were irrelevant for purposes of determining the subsequent ownership of those properties. In other words, despite conceding that the Disputed Land was designated as swampland and that title to such lands was "hereby granted" by the United States Congress as of September 28, 1850, the United States contended that those first 55 years of ownership should be ignored. Notwithstanding the prior holdings of this Court, the government sought to avoid the legal affect of the 1857 avulsion (an event that would conclusively invalidate the United States' ownership claims) by arguing that California's title to the Disputed Land did not "relate back." As explained further below, the Ninth Circuit Court endorsed that argument.

## REASONS FOR GRANTING THE PETITION

### A. The Ninth Circuit's Erroneous Application and Selective Use of This Court's Precedent Requires This Court's Intervention.

As noted, the Ninth Circuit's Initial Opinion and Amended Opinion both set forth its conclusion that the river movement analysis necessary to determine title to the Disputed Land "should have commenced with the patent date (1905), not with pre-1905 avulsive river movements." Initial Opinion at 22a; Amended Opinion at 10a. As support for that conclusion, the Ninth Circuit relied upon five (5) carefully selected United States Supreme Court opinions issued between 1897 and 1938.[4] In essence, the Ninth Circuit interpreted that precedent to "make clear that in order to perfect legal title to swamp and overflowed lands, those lands had to be identified and patented." Amended Opinion at 8a. As explained below, the Ninth Circuit misapplied this Court's opinions.

In its Initial Opinion, the Ninth Circuit observed what it termed a "trend in the case law shift[ing] toward an understanding that in order to perfect the legal title to swamp and overflowed lands, those lands had to be identified and patented." Initial Opinion at 20a-21a. As support for that observation, the Court cited *United States v. O'Donnell*, 303 U.S. 501 (1938), *Joanna Little v. J. J. Williams*,

4. Interestingly, and perhaps revelatory, although it cited them in its Initial Opinion, in its Amended Opinion, the Ninth Circuit omitted any reference to three earlier Supreme Court opinions, each of which undercut its conclusion that the patent date is the starting point for the river movement analysis. Each of these opinions is addressed in the text of this Petition.

231 U.S. 335 (1913), *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), *Brown v. Hitchcock*, 173 U.S. 473 (1899) and *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897). In purporting to follow these Supreme Court holdings, the Ninth Circuit held that earlier rulings of this Court in *Wright v. Roseberry*, 121 U.S. 488 (1887), and other related swamp lands opinions were implicitly overruled. *See Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U.S. 559 (1896); *French v. Fyan*, 93 U.S. 169, 170 (1876). Because *Wright* plainly held that titles to properties designated under the Swamp Act "related back" to the date of the Act, the Ninth Circuit did not even attempt to reconcile that opinion with its "delayed conveyance" approach.

Upon close examination, however, it is clear that the cases cited by the Ninth Circuit do not establish or support the development of any "trend" toward abrogating the "relation back" doctrine. To the contrary, aside from carefully excerpted snippets and dicta, those opinions do not address the issue presented here, *i.e.*, whether sufficient title to swamp lands vests as of the date of the Swamp Act so as to require application of the accretion/avulsion analysis beginning on that date.

*United States v. O'Donnell*, 303 U.S. 501 (1938), is illustrative. *O'Donnell* addresses the narrow question of whether retained Mexican property rights are superior to title granted pursuant to the Swamp Act. It does not support the notion that Swamp Act rights are delayed or held in abeyance pending issuance of a patent. In fact, the analysis in *O'Donnell* assumes that Swamp Act titles are valid as of September 28, 1850, and then examines whether titles established by Mexican law *prior* to the Swamp Act take precedence. If it has any bearing on the issues before this

Court, a fair reading of *O'Donnell* supports perfection of title as of the date of the Swamp Act.

Similarly, in *Little v. Williams*, 231 U.S. 335 (1913), this Court addressed the question of whether a settlement between the State of Arkansas and the United States, which had been approved by the State legislature and Congress, could limit the amount of land to which the State was entitled pursuant to the Swamp Act. Without a great deal of apparent debate, the Court answered that question in the affirmative. *Id.* at 340. Nothing in that opinion, however, rejects, modifies or invalidates this Court's holding in *Wright v. Roseberry*, 121 U.S. 488 (1887), that the Swamp Act effected a *present grant* of title to those lands subsequently designated.

Turning next to *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), we find an opinion addressing a question regarding the proper scope of a riparian meander line survey. Only at the very end of the opinion does the Court even mention the Swamp Act. Its reference there is clearly dicta as it acknowledges that "[w]hatever claims the State of Ohio may have (pursuant to the Swamp Act) cannot be litigated in this suit." *Id.* at 309. Because the State of Ohio was not a party to that lawsuit, the Court could not address any claims regarding the scope of its Swamp Act ownership. *Id.* Obviously, that opinion cannot be fairly construed to overrule *Wright*.

The last two United States Supreme Court cases cited in the Amended Opinion, *Brown v. Hitchcock*, 173 U.S. 473 (1899) and *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897), are equally unsupportive of a purported "trend" toward patent issuance as the definitive title vesting date. *Brown* dealt with whether judicial intervention may be obtained prior to a final administrative determination by the

Secretary of the Interior regarding selection of swamplands. As would be expected, the *Brown* Court concluded that the courts cannot intervene prior to a final administrative decision. 173 U.S. at 477-78. Nothing in that opinion addressed the issue of whether title related back to the enactment of the Swamp Act.

Although based on somewhat different factual circumstances, *Rust* is, in essence, another case dealing with the appropriate time for exercise of judicial power. Fundamentally, *Rust* confirms only that the Secretary of Interior retains Swamp Lands Act selection jurisdiction until he finishes the process. Then, but not before, the courts are available to contest the Secretary's decision. 168 U.S. at 598. Nothing in this opinion indicates that river movement events occurring between September 1850 and the date of the final decision by the Secretary are to be disregarded for purposes of determining ownership of the property under the Secretary's jurisdiction.

Finally, the Ninth Circuit Court cited its earlier opinion in *United States v. 62.57 Acres of Land in Yuma County, Arizona*, 449 F.2d 5 (9th Cir. 1971), in support of its holding that the patent date is controlling "for determining a river's position and that the doctrine of relation back did not apply." Initial Opinion at 22a. First, it is essential to recognize that the *62.57 Acres of Land in Yuma County* case did not deal with swamp and overflowed lands. Although the lands involved were riparian, none of the competing ownership claims were based upon the lands having been designated as subject to the Swamp Act. Thus, the *62.57 Acres* opinion has no precedential effect with regard to the lands at issue here.

As to the former principle concerning the patent date as controlling for river movement analysis purposes, the Ninth Circuit Court appears to have erred by seeking to apply the rule beyond its appropriate context. While that rule may apply under the facts of the *62.57 Acre* case, it does not – and cannot – apply when the case involves swamp lands. In the latter case, the relation back doctrine is far more than "a fiction of law adopted by the courts solely for the purpose of justice." 449 F.2d at 6. Indeed, as to swamplands, the relation back doctrine was expressly established by statute and recognized by this Court in a consistent line of decisions. As such, the courts not only may employ the doctrine to achieve justice, they *must* follow the doctrine to enforce the law. Anything else is judicial error.[5]

Finally, even if the *62.57 Acres* holding did apply to swamp lands (which it does not) and even if the *62.57 Acres* court was correct in concluding that the doctrine of relation back did not apply, the Ninth Circuit's opinion in that case cannot supersede this Court's long-established rule to the contrary. When contrary to the pronouncements of *this* Court, the Ninth Circuit precedent is of no material import.

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5. In its Amended Opinion, the Ninth Circuit Court deleted the phrase "and the doctrine of relation back did not apply." Amended Opinion at 12a. It appears that this deletion was motivated by the Court's recognition that the *62.57 Acres* case, because it did not involve swamp lands, did not involve an *in praesenti* conveyance and thus *could not* have given rise to the doctrine of relation back. If so, the Court's deletion of the phrase did not correct its erroneous application of the "patent dates" principle to this case – a case that *does* involve swamp lands.

**B. Review Should Be Granted Because the Ninth Circuit Court of Appeals Has Issued an Amended Opinion Setting Forth Its Decision on an Important Question of Federal Law that Conflicts with Relevant Decisions of this Court.**

This Petition seeks reaffirmation of a principle first articulated by this Court more than 125 years ago. Beginning at least as early as 1876, this Court has uniformly held that:

> the swamp-lands act was a grant *in praesenti*, by which the *title to those lands passed at once to the State in which they lay*, except as to States admitted to the Union after its passage. *The patent, therefore*, which is the evidence that the lands contained in it had been identified as swamp-lands under the act, *relates back and gives certainty to the title [as of] of the date of the grant.*

*French v. Fyan*, 93 U.S. 169, 170 (1876) (sic). That language is neither equivocal nor ambiguous. It plainly confirms that: (1) *title* to swamp-lands *passed to the individual affected states "at once"*; and (2) the patent to those lands, when issued, "relates back" to the date of the grant and "gives certainty to the title." In other words, with regard to swamp lands, the patent does *not* serve the typical function as the functional equivalent of a deed. Rather, the patent is merely "evidence" of the identification of the lands conveyed and "declaratory" of the title previously conveyed. *Wright v. Roseberry*, 121 U.S. 488, 500 (1887).

Contrary to the conclusion reached by the Ninth Circuit, these principles of law have never been altered by this Court. In fact, although *Wright v. Roseberry* is often cited as the

seminal Supreme Court case with regard to passage of title to swamp lands, its progeny uniformly endorse its principles.

For example, proceeding from a historic chronological framework, in *Rogers Locomotive Machine Works v. American Emigrant Company*, 164 U.S. 559 (1896), this Court (citing *Wright v. Roseberry* and others) reaffirmed the "relation back" doctrine which provides that, even though the lands may be identified years after the 1850 Act, title to swamp lands becomes "perfect as of the date of the granting act." *Id.* at 570. This doctrine remains the fundamental legal principle upon which swamp land title disputes are to be analyzed. *See Little v. Williams*, 231 U.S. 335 (1913) (the act of 1850 was *in praesenti* such that, when identified, title to the (swamp lands) becomes perfect as of the date of the act).

If this doctrine of relation back is to have any legal significance, it must be applied to this case. As this Court has uniformly recognized, Congress clearly intended that the states were to be given *immediate* title to swamp and overflowed lands. When it enacted the Swamp Act, Congress openly acknowledged that specific identification of those lands to be designated as swamplands would take some time. Nonetheless, Congress plainly expressed its intention to effectuate passage of title as of September 28, 1850, regardless of the date of identification. Congressional intent will be thwarted in this case unless the date of enactment of the Swamp Act is deemed the starting point for analysis. If the Ninth Circuit's Amended Opinion is permitted to stand, there is a 55-year period during which the State of California's title is of no force or affect. Manifestly, that is contrary to the expressed will of Congress and contravenes the principles this Court has uniformly and repeatedly endorsed and confirmed.

### C. Review is Warranted Because the Rules Applicable to the Disposition of this Case Affect Property Titles Along Many Major Watercourses and Within Many Different States.

Undoubtedly, this Court annually receives thousands of Petitions for Writs of Certiorari, each of which argues that its particular case is of monumental import and national significance. Certainly, the landowners/Petitioners here hold similar beliefs with regard to the importance of their Petition. Although this case directly impacts title to a relatively small (130 acre) parcel of land located on the banks of the Colorado River, the ownership of thousands of parcels of riparian land located within the jurisdiction of the Ninth Circuit Court of Appeals will be subject to a novel and incorrect application of the Swamp Act. There is no cogent rationale or legal basis for allowing that to occur.

For more than 150 years, this Court has interpreted the Swamp Act to be an *in praesenti* grant of title to the affected lands. Now, after indicating in its Initial Opinion that it observed a "trend" in the Supreme Court opinions toward a different interpretation, and then retracting that observation in its Amended Opinion, the Ninth Circuit Court has effectively overridden this Court's line of precedent. With all due respect, the Ninth Circuit misperceived the existence of a "trend" to abandon the relation-back application of the Swamp Act.

As for the scope of the significance of this case, a review of this Court's prior Swamp Act opinions reveals the geographical expanse of the Act's application. This Court has decided cases involving disputes regarding ownership of swamp and overflowed lands located in states as far north

as Minnesota and Michigan, to states as far south as Arkansas; from states as far east as Ohio, to states on the west coast (including, without limitation, California and Oregon). Congress expressly granted ownership to swamp and overflowed lands to states throughout the country. Although the Ninth Circuit's opinion here is arguably not applicable outside the circuit, if allowed to stand it has the potential for starting a "trend" among the circuits in direct conflict with this Court's long-standing interpretation of the Swamp Act.

## CONCLUSION

This case presents this Court with an opportunity to correct a clear error by the Ninth Circuit before it adversely impacts other similarly situated landowners. Although, admittedly, such an opportunity may not be rare, it nevertheless is significant. In this case, the federal government is utilizing its resources in an effort to take property from private citizens who have purchased and utilized it as their own for almost 100 years. Until the Ninth Circuit "re-wrote" the Swamp Act and this Court's precedents with respect thereto, there was no legal or factual support for the government's claims. Without this Court's intervention, the Petitioners are faced with yet another lengthy and expensive trial in order to seek reaffirmation of their titles by the district court. Such a result is unwarranted and unfair. All that need be done to end this lawsuit is this Court's issuance of a Writ of Certiorari and reaffirmation of its long-standing principles regarding the *in praesenti* nature of the conveyance of swamp and overflowed lands. Petitioners, therefore, respectfully request that the Court exercise its discretion to grant the instant Petition.

Respectively submitted,

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# APPENDIX

# APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 28, 2002, AMENDED MAY 29, 2002

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-16008

D.C. No. CV-94-01624-PGR

ORDER AND AMENDED OPINION

UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Fort Mojave Indian Tribe,

*Plaintiff-Counter-Defendant-Appellant*,

v.

EMILY BYRNE; NORMAN WADE; LINDA WADE; MCKELLIPS LAND CORPORATION; WILLIAM C. RAASIG; JACK D. ROSE; SOUTHWEST GAS CORPORATION; JACK R. HAWKINS; DORIS HAWKINS,

*Defendants*,

and

ROBERT H. CHESNEY; HOWARD M. BURDICK; ROSE MARIE BURDICK; JAMES ENGELMANN; THOMAS E. FRYER; BARBARA J. FRYER; RALPH GEORGE; MARGARET GEORGE; CRYSTAL L. GIANNOTTI; LUCINDA GIANNOTTI; ALVIN GRUDEM AKA ALVIN GRUDEN; ALORA GRUDEM

aka ALORA GRUDEN; GAIL FRANCES JEWELL; CHARLES S. KING; JULIENE KING; MICHAEL M. SULLIVAN; MARY M. SULLIVAN; HELMUT TREFFKE; KATHRYN TREFFKE; LORRAINE E. KNOWLTON; MARGARITE A. COATES; MOJAVE COUNTY BOARD OF SUPERVISORS; JAY DEE HARP; JANALEE HARP; CARL LAWYER; WILMA B. LAWYER; ROBEN JOHNSON; KATHERINE JOHNSON,

*Defendants-Appellees*,

RICHARD ARIA; RUTH ARIA; LEWIS M. COOPER; JAMES L. HENDERSON; TERRY S. HENDERSON; G. HARRISON; CHAROLETTE HARRISON; DONALD LEWIS; MARGARET M. LEWIS; SHIRLEY J. JOHNSON, named in complaint as Shirley J. Brewer Johnson aka Shirley J. Brewer Johnson; KING PUMP AND DEWATERING CORPORATION; KENNETH R. LUCAS; LEORY MUNSON; SHARON O'CONNOR; DANIEL MCINTYRE; JOYCE MCINTYRE; MARC RICHARDS; GINGER RICHARDS; ROBERT HALL; FIDELITY NATIONAL TITLE COMPANY; MOJAVE RIVER ENTERPRISES,

*Defendants-Counter-Claimants-Appellees*,

CAMILLE ENGELMAN,

*Defendant-Counter-Claimant-Cross-Claimant-Appellee*,

v.

MARICOPA COUNTY TREASURER, a body politic,

*Cross-Defendant-Appellee*.

*Appendix A*

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
October 15, 2001—San Francisco, California

Filed January 28, 2002
Amended May 29, 2002

Before: Paul H. Roney,[1] Procter Hug, Jr. and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

**OPINION**

THOMAS, Circuit Judge:

In this appeal, we consider whether the district court had jurisdiction over a quiet title and ejectment action and, if so, whether it properly determined that the property in question was located in the State of California. We conclude that the district court erred in dismissing the case for lack of jurisdiction and in fixing the title to the lands on the basis of river movements that occurred prior to 1905, when the United States patented the disputed lands to the State of California. We reverse and remand for further proceedings.

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1. The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

*Appendix A*

I

Richard Bangs once observed that "Wild rivers are earth's renegades, defying gravity, dancing to their own tunes, resisting the authority of humans, always chipping away, and eventually always winning."[2]

In the early 1900's, there were few better examples of this than the Colorado River, which flows for 1400 miles through the western United States before reaching the Gulf of California. It drains a 242,000 square mile area including parts of seven states: Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona and California. There is a modest, triangular-shaped, 130-acre patch of land between Arizona and California, and the river runs through it. More accurately, it used to run through it. Therein lies the ownership problem.

Accretion and avulsion are, in a sense, the yin and yang of river course change. Accretion is "the gradual, imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain." *State v. Jacobs*, 380 P.2d 998, 1000 (Ariz. 1963). When a river moves by accretion, the boundary line set by the river continues to run through the center of the river channel in its new location. *Nebraska v. Iowa*, 143 U.S. 359, 361 (1892), *cited in Arizona v. Bonelli Cattle Co.*, 489 P.2d 699, 701 (Ariz. 1971), *approved as amended*, 495 P.2d 1312 (Ariz. 1972), *rev'd on other grounds*, 414 U.S. 313 (1973).

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2. RICHARD BANGS, WHITEWATER ADVENTURE: RUNNING AMERICA'S GREAT RIVERS, 1 (1990).

*Appendix A*

In contrast, avulsion occurs when a river abandons its old course and adopts a new one "suddenly or in such a manner as not to destroy the identity of the land between the old and new channels." *Jacobs*, 380 P.2d at 1001. When a river moves by avulsion, the boundary does not move with the river, but instead remains in the center of the old channel. *Bonelli Cattle*, 489 P.2d at 701; *Jacobs*, 380 P.2d at 1001.

The United States brought an action on behalf of the Fort Mojave Indian Tribe for quiet title, ejectment, and trespass damages, asserting that the lands at issue ("the disputed property") attached by the natural process of accretion to land that the United States holds in trust for the Tribe. The defendants ("private landowners") are successors to California's 1905 patent, and they assert ownership interests in the disputed property on the basis of a chain of title stemming from this patent. The private landowners claim that the river changed course by avulsive movement prior to 1905, establishing the boundaries for the patent. In sum, as Norman MacLean might put it, the parties are haunted by waters.

The Arizona district court held that it lacked jurisdiction because the disputed property became part of the State of California due to avulsions in the Colorado River, but it nonetheless found that the private landowners held title to the disputed land.

*Appendix A*

II

The federal district courts' jurisdiction over actions concerning real property is generally coterminous with the states' political boundaries. *Columbia River Packers' Ass'n v. McGowan*, 219 F. 365, 377 (9th Cir. 1914). Because the remedies the United States seeks would act directly upon the land itself, jurisdiction is properly exercised in the state where the land is situated. The District Court of Arizona held that it lacked jurisdiction because the disputed property became part of the State of California due to an avulsive movement of the Colorado River in 1857.

However, the Interstate Compact Defining the Boundary Between the States of Arizona and California, Pub. L. No. 89-531, 80 Stat. 340, art. II (1966) ("Boundary Compact") fixed the boundary between Arizona and California for political purposes in the area encompassing the disputed property along the Colorado River, wherever it may run. The relevant section of the Boundary Compact provides:

> Point No. 1. The intersection of the boundary line common to California and Nevada and the centerline of the channel of the Colorado River as constructed by the U.S. Bureau of Reclamation, said point being common to the boundaries of Arizona, California, and Nevada, where the 35th degree of north latitude intersects the centerline of said channel; *thence downstream along and with the centerline of said channel* . . . [to a railway bridge at Topock, which is south of the disputed property] (emphasis added).

Because the disputed property now lies on the east side of the Colorado River, the Boundary Compact positions the disputed property within Arizona for political purposes.[3] Thus, the District Court erred in holding that it lacked jurisdiction.[4]

III

Although the Boundary Compact did establish the boundary between Arizona and California for political purposes, it did not affect private property titles. *United States v. Aranson*, 696 F.2d 654, 657 (9th Cir. 1983). Thus, we must proceed to the merits of the issue.

---

3. *Sherrill v. McShan*, 356 F.2d 607 (9th Cir.1966), is inapposite, because it was decided in February 1966, about six months before the Boundary Compact was enacted. In that case, the district court concluded, as in the present case, that a parcel of land on the east side of the Colorado River remained part of California, and dismissed the case for lack of jurisdiction. *Id.* at 608. On appeal, this Court affirmed, accepting the district court's determination that avulsive movements had placed the disputed lands in California, as well as the district court's analysis of both states' constitutions that led to the same result. *Id.* at 610. However, the Boundary Compact, once adopted, definitively established the political boundary between Arizona and California.

4. Although the district court held that it lacked jurisdiction because the property is located within the political boundary of California, it proceeded to decide the merits. Arguably, the district court should not have attempted to resolve the title question, given that resolution of the jurisdictional issue did not necessarily depend on resolution of title. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). However, given that the district court actually had jurisdiction under the Boundary Compact, any error in this respect was harmless.

*Appendix A*

The district court erred in basing its analysis on pre-patent avulsive movements of the Colorado River, specifically an 1857 avulsion. The proper analytical starting point is 1905, when the United States patented the disputed property to the State of California. It was not until 1905 that California held legal title to the disputed property. Therefore, river movements before 1905 are not relevant to fixing title.

The district court, and the private landowners, reason that title to the disputed property vested in 1850, when California became a state. It was also in that year that California obtained at least an inchoate or equitable right to the disputed lands under the Swamp and Overflowed Lands Act, 9 Stat. 519 (1850), codified at 43 U.S.C. § 982 ("Swamp Act"). The Swamp Act required the Secretary of the Interior to list and survey all swamp and overflowed lands and, upon request, to patent to the states all the unsold swamp and overflowed lands within their territorial limits. Swamp Act § 2; 43 U.S.C. § 983. *See Tubbs v. Wilhoit*, 138 U.S. 134, 136 (1891).

The United States Supreme Court addressed the issue of title to lands conveyed under the Swamp Act in a series of cases from the late nineteenth and early twentieth centuries. These cases make clear that in order to perfect the legal title to swamp and overflowed lands, those lands had to be identified and patented. In *United States v. O'Donnell*, 303 U.S. 501 (1938), for instance, the Court noted that the Swamp Act "invest[ed] the state in praesenti with an inchoate title to those lands falling within the description of the act, to be perfected as of the date of the act when the land should

be identified and the patent issued."[5] *Id.* at 509. Similarly, in *Joanna Little v. J.J. Williams*, 231 U.S. 335, (1913), the Court noted that it was only when the Secretary of the Interior identified and patented land granted under the Swamp Act that the fee-simple title vested in the state and the state's title became perfect. *Id.* at 340. The Court had applied the same reasoning to several earlier cases. In *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), the Court held that legal title of certain swamp land never passed to the state of Ohio, because the land was never patented to the state. *Id.* at 309. *Brown v. Hitchcock*, 173 U.S. 473 (1899), clearly announced that "[u]nder the swamp-land act, the legal title passes only on delivery of the patent." *Id.* at 476. *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897), explained that "wherever the granting act specifically provides for the issue of a patent [as does the Swamp Act], then the rule is that the legal title remains in the government until the issue of the patent." *Id.* at 593. Following this logic, we have held in a

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5. Appellees suggest that because perfected title to swamp lands is deemed effective as of the date of the Act, the appropriate starting date for the river analysis is 1850. We find this argument unpersuasive. The relation back doctrine may make the interest within the 1905 boundaries good as of 1850, but the doctrine cannot expand or contract the boundaries created by the 1905 patent. As the cases we cite in the text indicate, boundaries to swamp and overflow lands are determined exclusively by the process of identification and patent. Any other rule would create uncertainty among land owners, as all subsequent interests to land in swamp and overflow areas might fear that their property lines could be altered by earlier, unknown river movements. *See Wright v. Roseberry*, 121 U.S. 488, 505 (1887) (stating that a patent is intended to be "an invaluable muniment of title, and a source of quiet and peace to its possessor.").

quiet title action that the patent date is "the controlling date" for determining a river's position. *United States v. 62.57 Acres of Land in Yuma County, Arizona*, 449 F.2d 5, 8 (9th Cir. 1971).[6]

In short, the district court's analysis should have commenced with the patent date, not with pre-1905 avulsive river movements. Given the undisputed testimony that both accretion and avulsion occurred in the area after that date, a remand is required to permit the district court to conduct whatever proceedings it deems necessary for a re-analysis using the correct premise.

**REVERSED AND REMANDED.**

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6. The private landowners rely on *Arkansas v. Tennessee*, 246 U.S. 158 (1918), a case involving the boundary line between the two states, for the proposition that river movement analysis begins on the date on which a boundary line between two states is established (in the present case, the boundary was created in 1850, when California became a state). However, *Arkansas v. Tennessee* is not relevant to the present case, as it concerned the location of a state boundary rather than private title claims.

*Appendix A*

**ORDER**

The opinion filed January 28, 2002, is amended as follows:

At slip opinion page 1170, the second sentence of the first full paragraph, which begins "While cases decided early . . . " is deleted in its entirety and replaced with the following sentence: "These cases make clear that in order to perfect the legal title to swamp and overflowed lands, those lands had to be identified and patented."

The footnote 5 at slip opinion page 1170 is deleted in its entirety.

A footnote is added at slip opinion page 1170 in the first full paragraph, after the quote ending with " . . . when the land should be identified and the patent issued", which shall read: "Appellees suggest that because perfected title to swamp lands is deemed effective as of the date of the Act, the appropriate starting date for the river analysis is 1850. We find this argument unpersuasive. The relation back doctrine may make the interest within the 1905 boundaries good as of 1850, but the doctrine cannot expand or contract the boundaries created by the 1905 patent. As the cases we cite in the text indicate, boundaries to swamp and overflow lands are determined exclusively by the process of identification and patent. Any other rule would create uncertainty among land owners, as all subsequent interests to land in swamp and overflow areas might fear that their property lines could be altered by earlier, unknown river movements. *See Wright*

*v. Roseberry*, 121 U.S. 488, 505 (1887) (stating that a patent is intended to be "an invaluable muniment of title, and a source of quite and peace to its possessor.")."

At slip opinion page 1171 the following is deleted from the first partial paragraph: "and that the doctrine of relation back did not apply."

With the foregoing amendments, the appellee's petition for rehearing is denied.

## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 28, 2002

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-16008

D.C. No. CV-94-01624-PGR

UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Fort Mojave Indian Tribe,

*Plaintiff-Counter-Defendant-Appellant,*

v.

EMILY BYRNE; NORMAN WADE; LINDA WADE; MCKELLIPS LAND CORPORATION; WILLIAM C. RAASIG; JACK D. ROSE; SOUTHWEST GAS CORPORATION; JACK R. HAWKINS; DORIS HAWKINS,

*Defendants,*

and

ROBERT H. CHESNEY; HOWARD M. BURDICK; ROSE MARIE BURDICK; JAMES ENGELMANN; THOMAS E. FRYER; BARBARA J. FRYER; RALPH GEORGE; MARGARET GEORGE; CRYSTAL L. GIANNOTTI; LUCINDA GIANNOTTI; ALVIN GRUDEM AKA ALVIN GRUDEN; ALORA GRUDEM aka ALORA GRUDEN; GAIL FRANCES JEWELL; CHARLES S. KING; JULIENE KING; MICHAEL M. SULLIVAN; MARY M. SULLIVAN;

*Appendix B*

HELMUT TREFFKE; KATHRYN TREFFKE; LORRAINE E. KNOWLTON; MARGARITE A. COATES; MOJAVE COUNTY BOARD OF SUPERVISORS; JAY DEE HARP; JANALEE HARP; CARL LAWYER; WILMA B. LAWYER; ROBEN JOHNSON; KATHERINE JOHNSON,

*Defendants-Appellees*,

RICHARD ARIA; RUTH ARIA; LEWIS M. COOPER; JAMES L. HENDERSON; TERRY S. HENDERSON; G. HARRISON; CHAROLETTE HARRISON; DONALD LEWIS; MARGARET M. LEWIS; SHIRLEY J. JOHNSON, aka SHIRLEY J. BREWER JOHNSON; KING PUMP AND DEWATERING CORPORATION; KENNETH R. LUCAS; LEORY MUNSON; SHARON O'CONNOR; DANIEL MCINTYRE; JOYCE MCINTYRE; MARC RICHARDS; GINGER RICHARDS; ROBERT HALL; FIDELITY NATIONAL TITLE COMPANY; MOJAVE RIVER ENTERPRISES,

*Defendants-Counter-Claimants-Appellees*,

CAMILLE ENGELMAN,

*Defendant-Counter-Claimant-Cross-Claimant-Appellee*,

v.

MARICOPA COUNTY TREASURER, a body politic,

*Cross-Defendant-Appellee.*

*Appendix B*

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
October 15, 2001—San Francisco, California

Filed January 28, 2002

Before: Paul H. Roney,[1] Procter Hug, Jr. and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

**OPINION**

THOMAS, Circuit Judge:

In this appeal, we consider whether the district court had jurisdiction over a quiet title and ejectment action and, if so, whether it properly determined that the property in question was located in the State of California. We conclude that the district court erred in dismissing the case for lack of jurisdiction and in fixing the title to the lands on the basis of river movements that occurred prior to 1905, when the United States patented the disputed lands to the State of California. We reverse and remand for further proceedings.

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*Appendix B*

I

Richard Bangs once observed that "Wild rivers are earth's renegades, defying gravity, dancing to their own tunes, resisting the authority of humans, always chipping away, and eventually always winning."[2]

In the early 1900's, there were few better examples of this than the Colorado River, which flows for 1400 miles through the western United States before reaching the Gulf of California. It drains a 242,000 square mile area including parts of seven states: Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona and California. There is a modest, triangular-shaped, 130-acre patch of land between Arizona and California, and the river runs through it. More accurately, it used to run through it. Therein lies the ownership problem.

Accretion and avulsion are, in a sense, the yin and yang of river course change. Accretion is "the gradual, imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain." *State v. Jacobs*, 380 P.2d 998, 1000 (Ariz. 1963). When a river moves by accretion, the boundary line set by the river continues to run through the center of the river channel in its new location. *Nebraska v. Iowa*, 143 U.S. 359, 361 (1892), *cited in Arizona v. Bonelli Cattle Co.*, 489 P.2d 699, 701 (Ariz. 1971), *approved as amended*, 495 P.2d 1312 (Ariz. 1972), *rev'd on other grounds*, 414 U.S. 313 (1973).

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*Appendix B*

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The United States brought an action on behalf of the Fort Mojave Indian Tribe for quiet title, ejectment, and trespass damages, asserting that the lands at issue ("the disputed property") attached by the natural process of accretion to land that the United States holds in trust for the Tribe. The defendants ("private landowners") are successors to California's 1905 patent, and they assert ownership interests in the disputed property on the basis of a chain of title stemming from this patent. The private landowners claim that the river changed course by avulsive movement prior to 1905, establishing the boundaries for the patent. In sum, as Norman MacLean might put it, the parties are haunted by waters.

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*Appendix B*

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The federal district courts' jurisdiction over actions concerning real property is generally coterminous with the states' political boundaries. *Columbia River Packers' Ass'n v. McGowan*, 219 F. 365, 377 (9th Cir. 1914). Because the remedies the United States seeks would act directly upon the land itself, jurisdiction is properly exercised in the state where the land is situated. The District Court of Arizona held that it lacked jurisdiction because the disputed property became part of the State of California due to an avulsive movement of the Colorado River in 1857.

However, the Interstate Compact Defining the Boundary Between the States of Arizona and California, Pub.L. No. 89-531, 80 Stat. 340, art. II (1966) ("Boundary Compact") fixed the boundary between Arizona and California for political purposes in the area encompassing the disputed property along the Colorado River, wherever it may run. The relevant section of the Boundary Compact provides:

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*Appendix B*

Because the disputed property now lies on the east side of the Colorado River, the Boundary Compact positions the disputed property within Arizona for political purposes.[3] Thus, the District Court erred in holding that it lacked jurisdiction.[4]

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The district court erred in basing its analysis on pre-patent avulsive movements of the Colorado River, specifically an 1857 avulsion. The proper analytical starting point is 1905, when the United States patented the disputed property to the State of California. It was not until 1905 that California held legal title to the disputed property. Therefore, river movements before 1905 are not relevant to fixing title.

The district court, and the private landowners, reason that title to the disputed property vested in 1850, when California became a state. It was also in that year that California obtained at least an inchoate or equitable right to the disputed lands under the Swamp and Overflowed Lands Act, 9 Stat. 519 (1850), codified at 43 U.S.C. § 982 ("Swamp Act"). The Swamp Act required the Secretary of the Interior to list and survey all swamp and overflowed lands and, upon request, to patent to the states all the unsold swamp and overflowed lands within their territorial limits. Swamp Act § 2; 43 U.S.C. § 983. *See Tubbs v. Wilhoit*, 138 U.S. 134, 136 (1891).

The United States Supreme Court addressed the issue of title to lands conveyed under the Swamp Act in a series of cases from the late nineteenth and early twentieth centuries. While cases decided early on in this period suggested that legal title "relates back" to the date of the Swamp Act,[5]

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5. See *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U.S. 559, 570 (1896) ("While . . . the act of 1850 was in praesenti, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title became perfect as of the date of the granting act."); *Wright v. Roseberry*, 121 U.S. 488, 500 (1887) ("When identified, the title

(Cont'd)

the trend in the case law shifted toward an understanding that in order to perfect the legal title to swamp and overflowed lands, those lands had to be identified and patented. In *United States v. O'Donnell*, 303 U.S. 501 (1938), for instance, the Court noted that the Swamp Act "invest[ed] the state in praesenti with an inchoate title to those lands falling within the description of the act, to be perfected as of the date of the act when the land should be identified and the patent issued." *Id.* at 509. Similarly, in *Joanna Little v. J.J. Williams*, 231 U.S. 335 (1913), the Court noted that it was only when the Secretary of the Interior identified and patented land granted under the Swamp Act that the fee-simple title vested in the state and the state's title became perfect. *Id.* at 340. The Court had applied the same reasoning to several earlier cases. In *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), the Court held that legal title of certain swamp land never passed to the state of Ohio, because the land was never patented to the state. *Id.* at 309. *Brown v. Hitchcock*, 173 U.S. 473 (1899), clearly announced that "[u]nder the swamp-land act, the legal title passes only on delivery of the patent." *Id.* at 476. *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897), explained that "wherever the granting act specifically provides for the issue of a patent [as does the Swamp Act], then the rule is that the legal title remains in the government until the issue of the patent." *Id.* at 593.

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(Cont'd)

would become perfect as of the date of the act. The patent would be evidence of such identification, and declaratory of the title conveyed."); *French v. Fyan*, 93 U.S. 169, 170 (1876) ("The patent . . . which is the evidence that the lands contained in it had been identified as swamp-lands under that act, relates back and gives certainty to the title of the date of the grant.").

Following this logic, we have held in a quiet title action that the patent date is "the controlling date" for determining a river's position and that the doctrine of relation back did not apply. *United States v. 62.57 Acres of Land in Yuma County, Arizona*, 449 F.2d 5, 8 (9th Cir. 1971).[6]

In short, the district court's analysis should have commenced with the patent date, not with pre-1905 avulsive river movements. Given the undisputed testimony that both accretion and avulsion occurred in the area after that date, a remand is required to permit the district court to conduct whatever proceedings it deems necessary for a re-analysis using the correct premise.

**REVERSED AND REMANDED.**

---

6. The private landowners rely on *Arkansas v. Tennessee*, 246 U.S. 158 (1918), a case involving the boundary line between the two states, for the proposition that river movement analysis begins on the date on which a boundary line between two states is established (in the present case, the boundary was created in 1850, when California became a state). However, *Arkansas v. Tennessee* is not relevant to the present case, as it concerned the location of a state boundary rather than private title claims.

## APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED MARCH 30, 2000, FILED MARCH 31, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 94-1624 PHX-PGR

United States Of America, on its own behalf and for the benefit of the Fort Mohave Indian Tribe,

Plaintiff,

v.

Richard and Ruth Aria, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND ORDER

### I. BACKGROUND

On August 9, 1994, Plaintiff United States of America, on its own behalf and for the benefit of the Fort Mohave Indian Tribe ("Plaintiff") filed a Complaint and Request for Declaratory and Injunctive Relief and Monetary Damages. The action was for quiet title, ejectment and trespass damages involving a triangular-shaped area of land which lies east of the Colorado River ("River") on or near the Fort Mohave

Indian Reservation. Plaintiff asserts that, by the gradual process of accretion, the lands at issue attached to sections of land that the Plaintiff holds in trust for the Fort Mohave Indian Tribe.

Defendants, various individuals and entities with claimed interests in the property in question, claim that the boundary between California and the New Mexico Territory (later, the Arizona Territory) was forever established between four and eight years after California was declared a state: Defendants claim that the land in question was created based on an avulsive movement of approximately 3.7 miles in the main channel of the River that occurred sometime between 1854 and 1858.

On February 14, 1995, Plaintiff filed its First Amended Complaint, terminating certain Defendants and. adding other Defendants. Various Defendants filed counterclaims against Plaintiff. On July 5, 1996, Plaintiff filed a Motion for Judgment on the Pleadings in relation to the counterclaims filed. Additionally, default was entered against nine individual Defendants on July 23, 1996.

On December 2, 1996, the Court held a hearing in relation to the various issues pending before the Court. The Court heard oral argument on the motion for Judgment on the Pleadings, and additionally set a hearing for the request for entry of default judgment. A Pretrial Conference was also set.

*Appendix C*

On March 3, 1997, the Court held a Pretrial Conference. At that conference, the Court granted the Motion for Judgment on the Pleadings, which terminated the various counterclaims filed. In addition, the Court denied the motions for entry of default judgment. The parties were ordered to submit an amended Joint Pretrial Statement which conformed with the Court's rulings. The Court then set the bench trial for June 3, 1997.

On April 28, 1997, the Court held a hearing in relation to a motion for mandatory settlement conference filed by Defendants James and Camille Engelmann, certain Defendants' Motion to Postpone the Trial, as well as Defendants' motion to move the trial to Phoenix from Prescott. The Court denied the motion for settlement conference and the motion to move the trial, but granted the motion to postpone the trial. On April 30, 1997, the Court reset the bench trial in this matter for September 9, 1997.

On August 8, 1997, Plaintiff and Defendant McKellips Land Corporation settled their claims, and judgment was entered in relation to that Defendant on August 11, 1997.

The bench trial in this matter commenced September 9, 1997. After five days[1] of evidence and testimony, the Court ordered the parties to file post-trial briefs after receipt of the trial transcript. The parties were to file simultaneous briefs within 30 days of receiving the transcript. The Court indicated

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1. The trial was held on September 9, 10, 11, and 12. However, due to the Court's calendar, the last day of trial was held on September 23, 1997.

the matter would be considered submitted after the briefing of the post-trial memoranda. The parties completed this briefing on December 20, 1997.

The Court having heard and considered the evidence presented at the trial, having observed the demeanor of the witnesses, and having carefully considered the extensive record in this matter, must issue its findings of fact and conclusions of law. The primary issues in this case are (1) whether the disputed lands were formed by the gradual process of accretion, and thus attached to the adjacent uplands, or whether the River moved avulsively; and (2) if there was an avulsive movement, whether this alleged avulsion could have fixed title to the lands in the California landowners who preceded Defendants in the chain of title prior to 1883.

## II. FINDINGS OF FACT

### A. GEOLOGICAL FINDINGS

Over its geological life, the river, Colorado as we now call it, has coursed its way through the Grand Canyon to the sea. It flowed in a north to south direction through a narrow canyon with rock walls, Black Canyon, until it came to softer soil where it was able to erode the sediment walls and form a valley, the Mohave Valley. The valley carved was from two to seven miles wide and some twenty three miles in length whereupon the river was again restricted by narrow rock walls, now the Topock Gorge.

*Appendix C*

The river has meandered through this valley depending on the amount of water flow from its 169,300 square mile drainage area. In historic times before dam construction the flow could range from 1500 cubic feet per second to 300,000 or 400,000 cubic feet per second or greater.

Over its life the river thread, or thalwig, moved by both accretion and avulsion until dam construction and channelization largely fixed its course. Until then, however, it was continuously changing its course, sometimes by imperceptible degrees, sometimes by sudden and violent avulsion.

River actions as in alluvial valleys occurred in the valley in the usual effort: scour, deposition of silt, formation of loops, movement of the loops downstream and the cutting of a channel through the necks of loops, sometimes leaving lakes, sloughs, or lagoons. The river was incessantly moving, sometimes rapidly, shifting miles at a time. Even at times of low flow large tracts were swept away to be deposited elsewhere.

In the Mohave Valley such actions have sometimes been altered or impacted by distinct geologic factors. The Paiute Wash enters the river from the west and north of the disputed lands. Flooding from the wash's drainage area into a river flooding, or not flooding, from upstream drainage, would have a different impact on the deposit of silt and soil. Pushing water and detritus into the river, acting in uncertain ways, the channel could be altered as the river chose its course while the floods receded.

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The narrowing of the valley at Topock Gorge could alter the usual patterns of channel movement. The effect being, upon a heavy flow of 300,000 to 400,000 cubic feet per second through the valley, the river banks could overflow filling the valley. The receding waters, laden with soil, could choose a new channel but in a manner unlike the usual patterns of accretion or avulsion.

B. HISTORICAL FACTS

1. This lawsuit involves competing claims of title with respect to approximately 130 acres of land located approximately two miles north of Needles, California, now lying on the Arizona side of the Colorado River ("River"). The subject land is a triangular shaped parcel (hereinafter referred to as the "Disputed Triangle") with approximately 3000 feet of frontage along the River. With reference to the precise sections or parts thereof which are in dispute, the Disputed Triangle may be described as lying in:

> Section 13, T. 9 N., R. 22 E and Section 18, T. 9 N., R 23 E, San Bernardino Base & Meridian, San Bernardino County, California; Sections 4 and 9, T. 17 N. R. 22 W., Gila & Salt River Base Meridian, Mohave County, Arizona.

2. On September 9, 1850, the U.S. Congress approved an act providing for the formation of the State of California. Pursuant to that act, the eastern boundary of the state was established as the thread of the main channel of the River as it existed between the New Mexico Territory and the State

of California on the date of California's statehood. As of 1850 and continuing through February 24, 1863, Arizona was a part of the New Mexico Territory.

3. The term "thread" refers to that portion of the stream channel which has the highest velocity of flow.

4. As of the date California became state, title to the real property located within the bed of the River, from the thread of the main channel to the low water mark on the west bank of the channel, became vested in the State of California.

5. The location of the River through the reach in which the Disputed Triangle is located was mapped by Captain Sitgreaves ("Sitgreaves") in 1851. The map shows, although in scale of ten miles to one inch, that the River cuts across the northwestern corner of Section 18, T. 9 N. R.23 E. G&SRM.

6. The location of the River through the reach in which the Disputed Triangle is located was mapped by Lt. Whipple ("Whipple") in 1854. Based on a comparison of the maps prepared by Sitgreaves and Whipple, it is apparent that the River moved by accretion during the period of 1851 to 1854. Further, this accretive movement of the River reestablished the boundary between California and the New Mexico Territory so that, as of 1854, the boundary was parallel to and slightly west of the line between Sections 9 and 10, T. 17 N., R. 22 W., G&SRM.

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7. In 1855, H.S. Washburn ("Washburn"), Deputy Surveyor, performed the first known federal government land survey of the properties in this area pursuant to a contract dated February 9, 1855. Washburn surveyed the lands in the area of the Disputed Triangle on or about December 29-31, 1855. At that time, the River covered the eastern quarter of the Disputed Triangle.

8. Lieutenant Ives ("Ives") served as the topographic engineer under Whipple during Whipple's 1854 mapping of the River. Ives returned in 1858 and re-surveyed the River, noting and recording a significant change in the location of the River that occurred between 1854 and 1858. The displacement of the River was approximately 3.3 miles from the western side to the eastern side of the Mohave Valley. The new location of the River has been referred to as the "Spear's Lake Bulge" or "Spear's Lake Bend." At the time of Ives' mapping, the Spear's Lake Bulge was the main channel of the River.

9. The River's movement from its 1854 location to its 1858 location was an avulsive movement. Therefore, even though the River moved more than 3.3 miles in that time period, the boundary between California and the New Mexico Territory did not change.

10. A map entitled "Bartholomew's Map of the Western States," dated 1856, depicts the alignment of the River at that time as generally along the western side of the Mohave Valley, as indicated by both the 1854 Whipple map and the 1855 Washburn survey. Therefore, the substantial movement of the River which formed the Spear's Lake Bulge took place some time between 1856 and December, 1858.

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11. A large flood of approximately 400,000 cubic feet per second passed through the subject reach of the River in 1857. This was the largest flood event that has occurred in the past 140 years on the River. This flood was the primary factor that caused the River to avulsively move from the west side to the east side of the Mohave Valley.

12. The location of the River on the east side of the valley and the existence of the Spear's Lake Bulge was corroborated in 1863 by Richard Gird ("Gird"), C. E. Commissioner, in a document he published entitled "Official Map of the Territory of Arizona." This map was approved by the Arizona Territorial Legislature on October 23, 1864.

13. In 1875, Lieutenant Bergland ("Bergland") produced a map of the Mohave Valley which shows the Spear's Lake Bulge in a location very similar to that depicted on the map prepared by Gird in 1863.

14. In 1882-83, G. W. Baker ("Baker"), on behalf of the United States General Land Office ("GLO") produced a cadastral survey of the California side of the River in the area of the Disputed Triangle. This survey map shows the west bank of the River along the west side of the Valley. However, an 1883 GLO map of the Arizona Territory indicates that the Spear's Lake Bulge still existed, with the main channel of the River located against or close to the valley's east mesa. The fact that the main channel of the River was still located on the east side of the Valley during the mid 1880's is further substantiated by a map prepared in 1887 by the Atchison, Topeka and Santa Fe Railroad ("AT&SF"), as well as a report prepared in 1923 by M. M. Kauffman ("Kauffman"), based on a personal reconnaissance in Mohave Valley.

15. In 1888, the River moved westerly such that the main channel returned to the western side of the Mohave Valley. When it relocated to the western side of the Valley, the River dial not reoccupy the same channel that it had abandoned in 1854 prior to the 1857 avulsion. The new channel it occupied in 1888 was approximately 0.5 miles west of the old channel it abandoned in 1857.

16. According to the 1883 GLO survey, lands located at the same location as the Disputed Triangle were depicted as lying within Section 13, T. 9 N., R. 22 E. and Section 18, T. 9 N., R. 23 E., of the San Bernardino Meridian in California.

17. In 1899 the United States Geological Survey ("USGS") produced a detailed survey map of the Mohave Valley. The 1899 map indicated that the main channel of the River was then located along the western side of the Valley. At this time, the main channel of the River lay primarily to the east of the Disputed Triangle. A small distributary channel of the River ran through the approximate center of the Disputed Triangle from the northwest to the southeast.

18. A 1902-1903 map prepared by the USGS indicates that the River had moved 1860 feet west of its alignment as depicted in the 1899 USGS map.

19. White settlers began to move into the Mohave Valley during the period from 1851 to 1900. Camp Mohave was established on the mesa north of the Mohave Valley in 1859. Jesse Harper ("Harper") moved into the Valley in 1870 and occupied land located on the Arizona side of the River.

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Gus Spear ("Spear") established his homestead on the eastern bank of the River in the mid-1870's and a resident was shown living on the west side of the River in 1883 by Baker, the GLO surveyor.

20. In 1905, the GLO produced the first official cadastral survey of the Arizona side of the River. The 1905 map indicates that the east bank of the River had moved 1339 feet east of its 1902-03 location.

21. In 1910, President Taft set aside land for the Mohave Indians who have inhabited the lower Colorado River valley for centuries. This land included Section 4, T. 17 N., R. 22 W., G&SRM. This land has been held in trust for the Fort Mohave Indian Tribe.

22. Chronologically, the next available map of the River alignment in this area was produced by the Rio Colorado Land and Irrigation Co. in 1910/1911. This map depicts the River within a single main channel, with the center of the channel located at the approximate midpoint of Section 18, T. 9 N., R. 23 E., G&SRM.

23. In February of 1912, the United States Indian Service Superintendent of Irrigation produced a map of the area that showed significant changes in the River. This map indicated that, in the immediate area of the Disputed Triangle, the River had moved 2975 feet west in one year. In the area north and south of the Disputed Triangle, this February 1912 map indicated that the River alignment had shifted approximately 1 mile laterally to the east.

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24. Additional maps of the River in this area were prepared in March and May of 1912. These maps, prepared by the Cotton Water and Irrigation Company and the United States Indian Service, respectively, demonstrate that the River movements during the period from 1910 to mid-1912 were destructive and avulsive. The latter map also shows that the River through this reach had developed a braided pattern, with islands formed both north and south of the Disputed Triangle.

25. Although there is no map available for the 1915 calendar year, available evidence indicates that, by that time, the River had moved eastward from its 1912 location.

26. A 1917-18 USGS map of the area indicates that the River had moved avulsively approximately I mile to the west, both north and south of the Disputed Triangle. On the Disputed Triangle itself, the 1917-18 map indicates that the channel width had contracted from an average of 2479 feet to an average of 1785 feet.

27. A 1923 map prepared by the U.S. Land Office indicates that the River covered the western 2/3 of the Disputed Triangle. At that time, the main channel of the River was approximately 2776 feet wide, substantially wider (in the vicinity of the Disputed Triangle) than indicated on either the 1917-18 or the 1912 maps and substantially wider than indicated on a subsequent 1935 map prepared by L.H. Foster ("Foster") and/or the 1936 aerial photography of the area taken by Fairchild Aerial Surveys, Inc.

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28. The changes in the channel of the River in the area of the Disputed Triangle during the period from 1899 through 1932 were both accretive and avulsive. Avulsive changes were most significant between 1899 and 1917. Specific periods in which avulsive actions were prevalent include 1899 through 1903 and 1912 through 1915. During those time periods, avulsive River movements of 0.5 to 2.0 miles were common.

29. An analysis of available geological information confirms that the channel of the River in the area of the Disputed Triangle has occupied a number of different locations during the 1850-1960 time frame. Historical descriptions of the River movements during that period indicate that many of the changes in the channel in the Mohave Valley have been rapid and of noticeable scale. Further, this information indicates that the lands that comprise the Disputed Triangle did not originate as a result of accretion to the Arizona side of the River. Rather, those lands were attached to the Arizona side of the River by abrupt, avulsive changes in the position of the River channel.

30. The avulsive nature of the movements in the River in the area of the Dispute Triangle was further confirmed by a 1996 refraction seismic survey and subsurface investigation. Based on data gathered from an investigation which included 28 refraction seismic line tests and 8 geotechnical borings, the nonhomogeneous, nonuniform nature of the geologic materials that comprise the Disputed Triangle indicates that the River changed position in this area abruptly, by avulsion, rather than gradually in a continuous series of accretive changes.

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31. In 1954, Perly M. Lewis, an engineer, reported to the Arizona State Boundary Commission on water movements in the Mohave Valley. Lewis was hired to support Arizona in the establishment of a permanent boundary alignment with California. At the time of his report the river was in the western portion of the valley. While he acknowledged the formation of the Spear's Lake Bulge as an avulsive event occurring between March 1, 1854 and November 11, 1858, he opined that there were no avulsions since September of 1850. His opinion, although self-contradictory, supported a favorable outcome for his client.

Lewis' counterpart in California, W. P. Rowe concluded the Spear's Lake Bulge was created by an avulsion.

These reports were to assist the Colorado River Boundary Commissions of California and Arizona in achieving a final boundary between Arizona and California. The Joint Summary Report of the commissions concluded that the retracement of the river's meanderings was impossible because of artificial changes such as construction of Hoover Dam and channelization. It determined and agreed not to define a boundary on a theory of retracement. It did not attempt to resolve private ownership interests. Specifically, legislation adopted by both the State of Arizona and the State of California contained property ownership protections.

32. The Bureau of Land Management surveys commenced in 1961, completed in 1982, and corrected in 1991 are so erroneous and defective that the court must reject them, as well as the report of Norville Shearer, and the study and testimony of James Simpson as they pertain to this case.

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33. Avulsive activity near the Disputed Triangle has been established by litigation and by the creation of Goat Island.

III. CONCLUSIONS OF LAW

1. Application of the law of either California or Arizona requires the same result based on the evidence presented.

2. Plaintiff's claim to title of the Disputed Triangle is denied on the grounds that an avulsive movement of the River occurred in 1857 which fixed the boundary of the State of California such that the Disputed Triangle was located entirely within the boundaries of California.

3. Plaintiff's claims for trespass damages, ejectment and injunctive relief are also rejected in that Plaintiff has no ownership interest in the lands which comprise the Disputed Triangle.

4. The Disputed Triangle is located within the jurisdictional boundaries of the State of California and title to that property cannot be resolved in this Court.

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ORDER

The Court having found that avulsive movements have taken place within the subject reach of the Colorado River thereby fixing the state boundary in a location east of the Disputed Triangle, and therefore located within the jurisdictional boundaries of the State of California so that title to that property cannot be resolved in this Court,

IT IS HEREBY ORDERED that Plaintiff's Complaint is dismissed.

DATED this 30th day of March, 2000.

s/ Paul G. Rosenblatt
HON. PAUL G. ROSENBLATT
United States District Judge

## APPENDIX D — STATUTES INVOLVED

THIRTY-FIRST CONGRESS. SESS. I. CH. 82, 83, 84. 1850.

CHAP. LXXXII.—*An Act to authorize the Appointment of Indian Agents in California.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President be authorized to appoint, with the advice and consent of the Senate, not more than three agents for the Indian tribes within the State of California. Such agents shall perform the duties now prescribed by law to Indian agents, and shall receive an annual compensation of three thousand dollars each.

APPROVED, September 28, 1850.

CHAP. LXXXIII.—*An Act for the Payment of a Company of Indian Volunteers.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of War be, and he is hereby, authorized and required to cause to be paid to the spy company of Indian mounted volunteers (Shawnees and Delawares) called and mustered into the service of the United States by Colonel W. S. Harney, United States army, on the first day of June, eighteen hundred and forty-six, and discharged the thirty-first day of August, eighteen hundred and forty-six, one day's pay and allowances for every day held in service under said muster, and the usual travelling allowances, according to rates established for volunteers under existing laws; and the sum of four thousand dollars is hereby appropriated for this object, out of any monies in the treasury not otherwise appropriated.

APPROVED, September 28, 1850.

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CHAP. LXXXIV.—*An Act to enable the State of Arkansas and other States to reclaim the "Swamp Lands" within their limits.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

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SEC. 4 *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

APPROVED, September 28, 1850.